United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1777

ESTHER FRIEDLANDER as Surviving Executrix of the Estate of Raphael Cohen,

Plaintiff-Appellant,

—against—

PETER I. FEINBERG, SAMUEL SOKOL, WEBB & KNAPP, INC., LOUIS ADLER, MARVIN GREENSPAN, WILLIAM ZECKENDORF, ZECKENDORF HOTELS CORPORATION, DRAKE ASSOCIATES, ALFRED KAPLAN, DOMAX SECURITIES CORP., PETER I. FEINBERG SECURITIES CORP., AGRIN, LAWSON & HOLLAND and HARRIS, KERR, FORSTER & COMPANY,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

The District Judge (Ward, J.) properly exercised his discretion to deny plaintiff-appellant's Rule 23(c) motion for class action status herein on the grounds (1) that plaintiff's class action motion, which was not made until almost four years after commencement of the action, was inexcusably late and (2) that plaintiff, having demonstrated "a total absence of the vigorous prosecution so crucial in class

actions" (A. 221-22), is not an appropriate representative of the purported class. The result below was a valid exercise of discretion for those reasons and was also correct because predominant issues which are not common to the class exist and class action status would not be in the interests either of the purported class or of the efficient judicial administration of this jury action.

Questions Presented

1. Did Judge Ward abuse his discretion in denying plaintiff's Rule 23(c) motion where it was brought on almost four years after the initial filing of the complaint, on the eve of trial, and with no actual justification for the delay?

2. Did Judge Ward abuse his discretion in holding that plaintiff was not an appropriate representative of the proposed class where she has no personal knowledge whatever of the transaction in suit, has been dilatory and unresponsive throughout pre-trial disclosure and has delayed unjustifiably in seeking class action status, and where her claims conflict with the wishes and best interests of the other purported class members?

3. In any event is a class action appropriate or even proper at bar where individual jury issues regarding the running of the statute of limitations, the class's non-reliance, and damages and exemplary damages are presented as to each member of the purported class?

If any one of these three questions is answered in the negative, then the decision below must be affirmed.

The Facts in Brief

This action was commenced on June 17, 1970 by Esther Friedlander and Abraham Cohen as Executors of the Estate of Raphael Cohen, Deceased (A. 1). They allege violations of federal and state securities laws in connection with an investment made by the decedent prior to January 15, 1960, more than ten years prior to the commencement of the action (A. 155). The transaction involved the formation of a limited partnership which purchased the Drake Hotel from and leased it back to corporations controlled by William Zeckendorf (A. 35-36). The gravamen of the complaint is that the defendants allegedly knew in 1959 but concealed from the decedent and the other 1100 limited partners that the Zeckendorf interests were financially unsound and that the Drake Hotel was not worth the amount paid for it by the partnership (A. 27). No other limited partner has ever raised or sought to join in that contention (A. 158).

The defendants include the partnership and its general partners who, of course, stood to lose far more than the limited partners (such as plaintiff's decedent) if the investment in the Drake went sour. They deny any wrongdoing and have raised several affirmative defenses, including that this action is barred by the New York six year statute of limitations.

It is undisputed that in 1962 (nearly eight years before the commencement of this action) the Zeckendorf interests suffered well publicized, severe financial reversals, culminating in their filing for bankruptcy in 1964 and 1965 (A. 143). In March 1963 the tenant fell into arrears on rentals due, and the syndication distributions to Raphael Cohen and the other investors were temporarily suspended (A.

143-46). Plaintiffs admitted in answers to interrogatories that the decedent had read about and thus had learned of Mr. Zeckendorf's financial distress in the newspapers at the time (see 369 F. Supp. at 918). Indeed, the uncertain financial condition of the Zeckendorf interests was expressly disclosed in 1960 in the very prospectus upon which plaintiff is suing.*

Despite the Zeckendorf collapse, the tenant thereafter fully paid its arrears and the partnership distributions were resumed (A. 148). The partnership, moreover, sold the Drake (A. 150-51); and at the time of the sale, the tenant had fully met its obligations under the lease. Indeed the sale of the Drake has produced profit over not only the price which the partnership had paid, but also the cost of an addition and other renovations to the Drake which were made while the partnership owned it, so that the members of the partnership will all recover a profit on their investment** (A. 148-51). The distribution to the partners of

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* The prospectus, for example, expressly cautioned (A. 142-43):

"*The consolidated balance sheet of Webb & Knapp, Inc.* [the principal Zeckendorf company involved] *at December 31, 1958* shows a total capital stock and surplus of $25,066,685, subject to a number of commitments and contingent liabilities similar to the proposed guaranty of the net lease of the Hotel. The consolidated statement of income for the calendar year 1958 *indicated an operating loss of $9,685,545* less a $3,169,348 reduction of Federal income taxes for prior years, resulting in a net loss for the year of $6,380,926. *Webb & Knapp, Inc. reported to the Securities and Exchange Commission a further loss of $3,495,198 for the six months ended June 30, 1959. Accordingly the value of the limited partnership interest offered hereby should be based primarily upon value of the Drake, the proposed addition and the results of its operations.*" (Emphasis added.)

** Thus this case is legally futile since, even if plaintiff presses on to trial, she will not be able to prove any damages as to almost all of the purported class, who, unlike plaintiff, still own their partnership interests. Cf. *Wolf* v. *Frank*, 477 F.2d 467, 478-79 (5th Cir. 1973) cert. denied 414 U.S. 975 (1973).

the proceeds of that sale and the profit received on it has been prevented by the pendency of this class action, since the partnership is itself named as a defendant and an alleged participant in the supposed wrongs and must retain sufficient funds to cover any possible judgment for the class, however unlikely plaintiff's prospects of obtaining such a judgment may appear. Thus, the maintenance of this questionable action is contrary to the interest of, and is prejudicing, the other limited partners (on whose behalf plaintiff seeks to sue as class representative) by preventing their prompt recoupment of their investment and profit. Since plaintiff has not even begun pre-trial discovery against any of the 13 defendants, if the decision below is reversed and this action is now designated a class action, that delay and prejudice will necessarily continue and be exacerbated. (Plaintiff's decedent had already sold his interest (A. 166), so that plaintiff herself does not care about and is not prejudiced by this delay; but the rest of the purported class clearly is.) If, on the other hand, the decision below is affirmed, the partners will all be promptly paid by the partnership in excess of or at least equivalent to any possible net judgment which plaintiff can recover for them.

Raphael Cohen, the purchaser of the limited partnership interest upon which plaintiff sues, is deceased. Abraham Cohen, who discussed the investment with his father and who was an Executor of his father's estate, is now also deceased. Esther Friedlander, as sole remaining Executrix, is the only person who purports to act as class representative if this action is designated a class action. Her counsel has stated that she has "no information whatsoever" concerning Raphael Cohen's investment in the limited

partnership (A. 120). She is clearly unqualified to prosecute this action on behalf of the class.

The Prior Proceedings

This action was commenced on June 17, 1970, by the filing of a complaint (A. 1). Plaintiffs served no discovery demand and no class action motion for more than three years thereafter.

The defendants appeared and answered, and on July 20, 1970, served a notice to take the depositions of the plaintiffs (Abraham Cohen, now deceased, and plaintiff-appellant Esther Friedlander) on July 30, 1970 (A. 95-96). After interminable delays and adjournments, the deposition of Abraham Cohen commenced on May 11, 1971 (A. 86). It was not concluded until December 6, 1972, more than two and a half years after it had been noticed (A. 91). Many documents which were promised were never produced by the plaintiff (A. 89-91). Plaintiff caused numerous delays and demanded countless adjournments on every conceivable ground (A. 85-91). On one occasion, plaintiffs simply failed to appear; on several others, adjournments of long duration were sought; on others plaintiff unilaterally terminated the deposition session after only an hour or two (A. 86, 89). All this was fully detailed to Judge Ward below (A. 85-91).

In the hope of expediting proceedings, the defendants then served interrogatories upon the plaintiffs on January 24, 1973. The interrogatories were answered in an incomplete and unresponsive form after more than four months on April 26, 1973 (A. 3, 91-93). In the meantime, plaintiffs

defaulted at the first pretrial conference and then adjourned the next one (A. 92).

Although plaintiff-appellant now seeks to explain plaintiffs' complete lack of diligence in the prosecution of this action on the basis of the so-called Zeckendorf stay order and defendants' summary judgment motion, the record shows that, as Judge Ward correctly perceived, these "reasons" are in truth mere afterthoughts, conjured up for the purpose of the class action motion.

1. *The Zeckendorf stay*—plaintiffs never suggested, during the entire three years in which defendants were conducting discovery, that such discovery was barred by Referee (now Bankruptcy Judge) Herzog's order (A. 56-57) in the Zeckendorf bankruptcy proceedings staying proceedings in other actions involving Zeckendorf (A. 83). Nor did plaintiffs ever request an adjournment of any proceeding in this action on that ground (A. 83). Indeed, plaintiffs emphatically opposed, in wrting (A. 60), the August 1970 suggestion of Mr. Zeckendorf's counsel that that order prevented all discovery steps in any action involving Mr. Zeckendorf "whether those steps involve Mr. Zeckendorf, another defendant *or anyone else*" (emphasis added) (A. 58-59). Plaintiff's counsel now claims (Br., p. 7) that, after having rejected in writing that interpretation by Mr. Zeckendorf's counsel, upon reflection he concluded it was correct. But plaintiff's counsel never sent copies of his August 1970 correspondence wth Mr. Zeckendorf's counsel to the other defendants and never advised the Court or any of the other defendants—who continued to conduct discovery for three years thereafter—that he had supposedly concluded that the entire action was stayed. Indeed a May, 1972 exchange of letters between plaintiffs

and other defendants clearly shows that the other defendants had no idea why plaintiffs had not yet moved for class action status (cf. A. 116).

In any event, plaintiffs had two simple alternative remedies available to them, either of which would have automatically removed any obstacle posed by Referee Herzog's order: (a) either discontinue the action as to Mr. Zeckendorf (without prejudice), as his counsel had invited (A. 59), thereby removing this action from the purview of the stay order; or (b) apply to Referee Herzog to lift the stay as to this action since it involves a claim of fraud and the damages sought are unliquidated in amount.* Plaintiffs did neither and took no steps to schedule discovery of the other defendants or even to see if they agreed with Mr. Zeckendorf's counsel—or otherwise to test the Zeckendorf view (A. 83).

2. *The summary judgment motion*—Plaintiff's alternate excuse (Br., p. 8) that her counsel delayed seeking class certification and commencement of discovery because defendants had said that they planned to move for summary judgment on the statute of limitations issue is belied by the contemporaneous documentary evidence (A. 84). The action was already two years old before plaintiffs ever raised this suggestion (in a letter of May 26, 1972) (A. 84, A. 115).** Surely this 1972 letter cannot explain plaintiffs'

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* Cf. *Matter of Redwood Furniture Company, Inc.*, 248 F. Supp. 228, 232 (W.D.N.C. 1965).

** Significantly, plaintiffs' May 1972 letter (A. 115) made no mention of the Zeckendorf bankruptcy stay and, thus, casts serious doubt upon plaintiffs' other claim that it was that stay which had prevented plaintiffs from proceeding and which justifies their failure to have initiated any proceedings in this action until 1974. The obvious conflict between plaintiffs' two alleged excuses casts doubt on the sincerity and validity of either of them.

failure during the prior two years to move under Rule 23(c). Moreover, defendants immediately responded with a letter dated May 31, 1972 (A. 84, A. 116) which unequivocally rejected plaintiffs' suggestion and put plaintiffs on notice that defendants deemed their delay to that point inexplicable. Defendants' letter stated (A. 116):

> "We have never heretofore discussed when or whether you would make a motion pursuant to Rule 23 for class determination. I have no knowledge of why you have refrained from making such an application heretofore."

Plaintiffs never responded to defendants' May 31, 1972 letter, and waited almost another two years before moving under Rule 23(c).

In any event, plaintiff's dilatory conduct did not stop with the summary judgment motion. After that motion was denied—on the ground that plaintiffs' answers to interrogatories were "unresponsive" and raised fact questions as to when plaintiff's decedent had actually realized that he was allegedly defrauded (see opinion reported at 369 F. Supp. 917, 918)—plaintiff still failed to serve a single discovery notice. And then, even after her Rule 23(c) motion was denied, with an opinion which expressly criticized plaintiffs for dilatoriness and "a total absence of the vigorous prosecution so crucial in class actions" (A. 221-22), plaintiff failed to file a timely notice of appeal (A. 9) and, over defendants' objection, had to obtain a Court reprieve from that lapse. Thereafter, plaintiff was unable to meet the Court deadlines for perfection of her appeal and has had to have her time to file her brief extended twice by this Court (A. 9-10).

The Motion to Dismiss the Appeal

Defendants have moved in this Court to dismiss this appeal on the ground that no final order is involved. Plaintiff opposed the motion on the ground that the so-called "death knell" doctrine applies. This Court, by order entered July 16, 1974, deferred decision on the motion and referred it to the panel which will hear this appeal.

The Decision Below

Judge Ward, who was and is fully familiar with this action and with the conduct of plaintiff herein (having been assigned the case for all purposes almost 2 years ago), denied class action status on the ground that the motion for class action determination was inexcusably late and on the further ground that plaintiff's failure diligently to prosecute the action demonstrated her lack of capacity to fairly and adequately prosecute the class claims (A. 217-22). Judge Ward stated, in pertinent part (A. 221-22):

> "No circumstances are present which would justify a delay of almost four years in bringing this motion. Plaintiffs proffer the arguments that an order of the Bankruptcy Court in a proceeding involving defendant William Zeckendorf prohibited plaintiffs' active prosecution of their action and that defendants' motion for summary judgment and discovery related thereto also excuse their delay. These contentions are not persuasive. Although counsel for Zeckendorf did indicate in a letter to plaintiffs' counsel his view that all actions in which Zeckendorf was named as a defendant were subject to the bankruptcy stay, the reply of counsel for

plaintiffs indicated their intention to proceed with this action as to all defendants except Zeckendorf. Reliance on the prospective motion for summary judgment as an excuse for the delay is likewise without merit.

In addition the record in this action shows a total absence of the vigorous prosecution so crucial in class actions. This is apparent from the numerous delays and general lack of activity outlined above."

In addition to the reasons set forth in Judge Ward's opinion, the denial of class action status herein should be affirmed on the further ground (not reached by Judge Ward) that questions of fact or law not common to the class, especially relating to the applicability to each class member of the statute of limitations, predominate. Furthermore, plaintiff's posture conflicts with the interests of the class; and to prosecute this jury case as a class action, would be unmanageable and require an unjustifiable excess of judicial and other resources.

ARGUMENT

I.

The Issue for Review Is: Does Judge Ward's Decision Constitute a Clear Abuse of Discretion?

The decision whether to grant class action treatment in a case such as this is essentially a discretionary one, in which the decision of the District Judge is entitled to great weight and, in the absence of a clear error of law, will not be reversed unless the District Judge clearly abused his discretion. *Bermudez* v. *U. S. Dept. of Agriculture,* 490 F.2d 718, 725 (D.C. Cir. 1973); *Gold Strike Stamp Co.* v.

Christensen, 436 F.2d 791, 793 (10th Cir. 1970); *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295, 298 (2d Cir. 1969); *Wilcox* v. *Commerce Bank*, 55 F.R.D. 134, 136-37 (D. Kan. 1972) aff'd 474 F.2d 336 (8th Cir. 1973); *duPont* v. *Perot*, 59 F.R.D. 404, 409 (S.D. N.Y. 1973).

As this Court stated in *City of New York* v. *International Pipe & Ceramics Corp., supra* (410 F.2d at 298), in affirming the denial of class action status:

> "the judgment of the trial court [under Rule 23] should be given the greatest respect and the broadest discretion, particularly if, as here, he has canvassed the factual aspects of the litigation."

Likewise, in *Bermudez, supra* (490 F.2d at 725), the Court of Appeals stated the standard for appellate review as follows:

> "On review we are aware that: 'The question of whether to allow a suit to proceed as a class action is one primarily for the determination of the trial judge. If he applies the correct criteria to the facts of the case, the decision should be considered to be within his discretion.' [citing *Gold Strike, supra* and *City of New York, supra*]. Keeping this standard of review in mind, we conclude that the class action determination by the district court should be upheld."

At bar, plaintiff does not contend that Judge Ward committed any error of law; indeed, in her brief (p. 5) she poses the question for review as follows:

> "The question presented on this appeal is that *based on the facts of this case*, did the Court below err in deny-

ing plaintiffs' Rule 23 motion for class designation?" (Emphasis added.)

Defendants respectfully submit that plaintiffs, who had the burden of proof below* as well as on appeal, have not and cannot show that the order appealed from constituted an abuse of discretion. Judge Ward's decision was not only a perfectly reasonable exercise of discretion, but in fact was eminently warranted on the facts, with which he (as the Judge to whom the case has been assigned for all purposes for the past two years) was fully familiar.

II.

Judge Ward Correctly Concluded That Plaintiffs' Rule 23(c) Motion Was Made Inexcusably Late.

Rule 23(c)(1) of the Federal Rules of Civil Procedure requires that "as soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Civil Rule 11A(c) of the Civil Rules of the United States District Court for the Southern District of New York, which became effective April 30, 1970, further requires that:

> "Within sixty (60) days after the filing of a pleading asserting a claim for or against a class, the party asserting that claim shall move for a determination under Fed. R. Civ. P. 23(c)(1) as to whether the action

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* See, e.g., *Rossin* v. *Southern Union Gas Co.*, 472 F.2d 707, 712 (10th Cir. 1973); *Poindexter* v. *Teubert*, 462 F.2d 1096, 1097 (4th Cir. 1972); *Demarco* v. *Eden*, 390 F.2d 836, 845 (2d Cir. 1968); *Free World Foreign Cars Inc.* v. *Alfa Romeo, SpA*, 55 F.R.D. 26, 29 (S.D.N.Y. 1972), which expressly hold that the plaintiff bears the burden of proving that he satisfies all of the elements of Rule 23(a) and (b) in order to prevail on a Rule 23(c) motion.

is to be maintained as a class action and, if so, the membership of the class."

Plaintiffs at bar simply ignored those requirements. This action was commenced in June of 1970; yet no application for class action status was made until February 1974, almost four years later.

In addition, where, as here, the plaintiff's failure to move promptly for class action status is coupled with other dilatory conduct, the denial of class action certification is especially warranted. See, e.g., *Taub* v. *Glickman,* CCH Fed. Sec. L. Rep. ¶92,874 (S.D.N.Y. 1970); *Dienstag* v. *Bronson,* not officially reported, Dkt. #68 Civ. 576 (S.D. N.Y. 1972); *Adise* v. *Mather,* 56 F.R.D. 492 (D. Col. 1972). See also: *Carracter* v. *Morgan,* 491 F.2d 458, 459 (4th Cir. 1973).

In *Taub* v. *Glickman, supra* (CCH ¶92,874) the Court denied class action status, even though Civil Rule 11A had not yet become effective in time to be applicable to that case, because the class motion had been made more than two years after the action was commenced and the plaintiffs had defaulted twice in Court proceedings. The dilatory conduct of plaintiffs in the instant case was far more aggravated than that in *Taub.* Almost four years elapsed between the commencement of this action and the making of the class action motion; moreover plaintiffs defaulted in appearing for sessions of their examination, in appearing at the first pretrial conference in this case and even in serving timely notice of appeal (A. 9-10, 85-92). On more than a dozen occasions plaintiffs unilaterally cancelled deposition sessions scheduled by mutual agreement, and because of

plaintiffs' refusal to agree to adjourned dates, defendants twice had to renotice plaintiffs' depositions (A. 85-92). The answers served by plaintiffs to defendants' interrogatories were on their face inadequate and unresponsive; indeed the Court below expressly characterized them as "unresponsive" (369 F. Supp. at 918). Further, plaintiffs failed to take any steps to prosecute affirmatively this action on behalf of the class.

Plaintiff's proffered excuses for the failure to proceed, as shown above, are unconvincing and without merit. The attempt to blame the delay on defendants' alleged delay in moving for summary judgment is feeble and at odds with the facts. It was not until May 26, 1972, which was already two years after this action had been commenced, that plaintiffs even suggested that they should await the summary judgment motion before seeking class action status. Even then, however, after defendants promptly rejected that suggestion (A. 83, A. 116), plaintiffs waited almost two additional years to file their Rule 23(c) motion.

The excuse premised upon the stay issued by Bankruptcy Judge Herzog is equally unconvincing and disingenuous. In the first place, whatever may have been the view expressed by counsel for Mr. Zeckendorf (A. 59), plaintiffs' counsel disputed that view and expressed his intention to proceed against the other named defendants (A. 60). That was as early as August 17, 1970; yet plaintiff noticed no such proceedings during the next four years (cf. A. 1-7). And that was the view of only one defense counsel; none of the other defendants subscribed to it or even received copies of the exchange of correspondence between plaintiff's counsel and Mr. Zeckendorf's. As Judge Gagliardi held in *Dienstag* v. *Bronsen, supra*:

> "No circumstances are present which would justify a four year delay in the instant case. Plaintiffs proffer the argument that the action was stayed by Judge Croake's decision. Such a contention is not at all persuasive for Judge Croake's decision merely stayed the depositions of two defendants. It is readily apparent that no discovery was necessary to bring the instant motion. Assuming however that discovery was needed, nothing in Judge Croake's order precluded plaintiffs from discovery proceedings against the remaining defendants."

In any event, if plaintiffs actually deemed themselves hindered by the stay order, they were at liberty to apply to the bankruptcy court for an order lifting the stay as to this action. Since the fraud claim in this action had not yet been reduced to provable form, and a claim resting upon fraud liability is not dischargeable in bankruptcy, it is likely that the bankruptcy court would have granted an order lifting the stay. See, e.g., *Matter of Redwood Furniture Company, Inc.*, 248 F. Supp. 228, 232 (W.D.N.C. 1965) and cases cited. Alternatively, the plaintiffs might have discontinued without prejudice as against this one peripheral defendant (which would not have prevented his being called as a non-party witness for pre-trial discovery), and thereby removed this case from the purview of the stay order. This latter alternative was expressly offered to plaintiffs in August of 1970 (cf. A. 59) but was ignored by them.

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The cases cited by plaintiff are not in point and, in any event, do not render Judge Ward's exercise of discretion on the facts at bar unreasonable.

For example, although the Court in *Cohen* v. *Tenney,* Dkt. #67 Civ. 4187, which antedated Civil Rule 11A, did excuse the plaintiff's tardiness in moving for class action status, the defendants were unable to show any prejudice from the delay and a third party who was not affected by the plaintiffs' delay was moving to intervene in the action. No such third party intervention has been attempted at bar; and the defendants have amply shown prejudice by virtue of the delay, namely the inability of Drake Associates (because it is a party defendant herein) to distribute to the limited partners their investment and their profit on that investment. And the two cited cases decided after the adoption of Rule 11A which permitted delay beyond its 60 day period involved delays of some 25 days at most, a far cry from plaintiff's almost four years of delay at bar.

Plaintiff's reliance on *Feder* v. *Harrington,* 52 F.R.D. 178 (S.D.N.Y. 1970) is unjustified. Plaintiff has *omitted* two crucial sentences in her quotation from *Feder,* which alter its entire meaning and application to this action (at p. 182):

> "Moreover, plaintiff's conduct cannot be characterized as dilatory since she has completed discovery during the interim and is apparently ready for trial. In addition, there has been no showing that the motion was not made as soon as practicable."

At bar, by way of contrast, plaintiff has taken no meaningful discovery and the record clearly shows that the motion was *not* made as soon as practicable.

Plaintiff's attempt to fob off responsibility for her own inexcusable delay on the Court and defendants is hardly worthy of response. Not a single case cited by plaintiff

excused a class plaintiff's tardiness on the ground that the Court or defendants did not do his work for them.* *Frost* v. *Weinberger*, 375 F. Supp. 1312, 1318-19 (E.D.N.Y. 1974) never even discussed the point.** In *Jeffrey* v. *Malcolm*, 353 F. Supp. 395 (S.D.N.Y. 1973) although the Court made reference in dicta to its power to act on its own under Rule 23(c), the Court struck the class allegations and dismissed the complaint. And in *Weisman* v. *MCA, Inc.*, 45 F.R.D. 258 (D. Del. 1968), both sides had timely moved.

III.

Judge Ward Correctly Concluded That Plaintiff Is Not an Appropriate Representative of the Purported Class.

Plaintiff has clearly failed to demonstrate the diligence in prosecution which is required of a class plaintiff, as shown in detail above. Thus Judge Ward correctly concluded, as a separate alternative reason for denying plaintiffs' class action motion, that plaintiffs' conduct during the almost four years in which this action was pending demonstrated "a total absence of the vigorous prosecution so crucial in class actions" (A. 221-22). In itself such conduct

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* And, indeed, several recent cases have expressly stated that the burden of proof imposed on a class action plaintiff places an affirmative duty on him to move promptly for class action certification. See, e.g., *Carracter* v. *Morgan*, 491 F.2d 458, 459 (4th Cir. 1973); *Glodgett* v. *Betit*, 368 F. Supp. 211, 214 (D. Vt. 1973).

** *Frost* merely states that a presumption arises at the inception of the case that class action status exists. However, it is well-settled that a class plaintiff must do more to obtain class certification than merely file a complaint captioned "class action". As the Court of Appeal stated in *Rossin* v. *Southern Union Gas Co.*, 472 F.2d 707, 712 (10th Cir. 1973) "a class action does not exist merely because it is so designated in the pleadings". Accord: *Glodgett* v. *Betit*, *supra* (368 F. Supp. at 214); *In re Swan-Finch Oil Corp.*, 279 F. Supp. 386, 391 (S.D.N.Y. 1967).

renders plaintiff an inadequate class representative at bar. See, e.g., *Carracter* v. *Morgan,* 491 F.2d 458, 459 (4th Cir. 1973); *Maynard Merel & Co.* v. *Carcioppolo,* 51 F.R.D. 273, 277 (S.D.N.Y. 1970) (Mansfield, J.); *Dienstag* v. *Bronsen,* Dkt. #68 Civ. 576 (S.D.N.Y. 1972) (Gagliardi, J.); *Taub* v. *Glickman,* CCH Fed. Sec. L. Rep. ¶92,874 (S.D. N.Y. 1970).

In addition, plaintiff's claims are not typical of the class she purports to represent and, indeed, appear to be antagonistic to the interests of the other members of the purported class. The acts in question occurred prior to 1960 (A. 14-19) and involve a New York City real estate syndicate; yet not a single other limited partner has ever raised a similar claim or expressed any interest in this action (A. 158). Moreover, plaintiff, by her own counsel's admission (A. 120), knows nothing whatsoever about the facts of the case; indeed, as shown in detail below (A. 147-55), plaintiffs' moving papers were replete with inaccuracies about the basic facts involved.* Finally, and perhaps most significant, to designate and continue to maintain this as a class action will prevent the partnership (which as a named wrongdoer and defendant must conserve its assets in the unlikely event that plaintiff prevails) from distributing to

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* For example, plaintiff's moving affidavit argued (A. 37) that no disclosure was made in the prospectus about Zeckendorf's financial distress; in actual fact, express disclosure was made in the financial statements and at page 8 of the prospectus (A. 142-43, A. 148). Plaintiff also incorrectly claimed (A. 37), by an erroneous reference to only part of the lease involved (cf. A. 148), that the rental to be received exceeded the net income which could be generated from operating the Hotel Drake (A. 148, A. 150). Likewise, plaintiff's claim (A. 40) that the partnership took over the hotel is completely incorrect and is contradicted by the documents received by plaintiff's own decedent; the partnership never took over the hotel; the hotel was sold (A. 150-51, A. 144-46).

the other partners the return of their investment and the profit which has now been earned on the sale of the hotel (A. 144-46, A. 153-54). Such represents a hardship to and directly conflicts with the interests of most if not all of the other partners who have been awaiting receipt of their aliquot shares from the sale of the hotel; plaintiff's decedent sold his interest (A. 166) so that plaintiff herself is not harmed by the delay she has caused the other partners.

Under such circumstances, the claims asserted by plaintiff are not representative of the interests of the class, and class action status was properly denied her. See, e.g., *Carroll* v. *Amer. Federation of Musicians,* 372 F.2d 155, 162 (2d Cir. 1967); *Matarazzo* v. *Friendly Ice Cream Corporation,* 62 F.R.D. 65, 68 (E.D.N.Y. 1974); *duPont* v. *Perot,* 59 F.R.D. 404, 409-11 (S.D.N.Y. 1973); *Free World Foreign Cars.* v. *Alfa Romeo S.p.A.,* 55 F.R.D. 26, 28-29 (S.D.N.Y. 1972); *Ruggiero* v. *American Broculture Inc.,* 56 F.R.D. 93, 95 (S.D.N.Y. 1972); *Maynard, Merel & Co.* v. *Carcioppolo,* 51 F.R.D. 273, 277 (S.D.N.Y. 1970) (Mansfield, J.).

As Judge Mansfield aptly stated in *Maynard, Merel & Co.* v. *Carcioppolo, supra* (51 F.R.D. at 277):

> "Rule 23(a)(4) states that a class action may not be designated unless 'the representative parties will fairly and adequately protect the interests of the class.' We must be convinced that plaintiffs would vigorously prosecute the action on behalf of all members of the class. [citation omitted]. 'Since all members of the class are to be bound by the judgment, diverse and potentially conflicting interests within the class are incompatible with the maintenance of a true class action.' [quoting *Carroll, supra*]."

duPont v. *Perot, supra* (59 F.R.D. 404), is illustrative. The plaintiff, a partner of the securities firm duPont Glore Forgan & Co., brought a class action on behalf of the other partners, complaining of an arrangement by which H. Ross Perot had invested in the partnership and assumed control thereof. The plaintiff sought damages but not recission of the agreements with Perot or the general releases given to him by the duPont partners pursuant thereto. The Court denied class action status because, inter alia, the relief sought by the plaintiff potentially conflicted with the possible interests of the other partners who the Court felt might wish to seek rescission of Perot's investment in the partnership and their releases to him (at p. 411). Additionally, the Court noted (at p. 412) that although the case was a year old, no other member of the purported class had joined the plaintiffs. The Court stated (at p. 411):

> "The Court admits that there is no certainty that the events described supra will come to pass. But this Court must consider not only actual conflicts of interest between plaintiff and his purported class, but also the potential conflicts arising from the litigation [citation omitted]. In making that assessment, it requires no stretch of the imagination to find that the potential for conflict of interest in the maintenance of this suit, between plaintiff and those who felt they had salvaged something from what seemed to be a hopeless situation and who had immunized themselves from staggering liability, is of a high order of magnitude" [citation omitted].

IV.

Predominant Non-Common Issues Render This Action Inappropriate for Class Status.

An additional reason for denial of the motion, upon which Judge Ward did not pass but which further requires affirmance of his decision, is that there are serious non-common factual and legal issues involved which render a jury trial of this case as a class action wholly inappropriate and unmanageable. Such a jury trial on a class action basis would clearly not be in the interest of efficient judicial administration.

A principal threshold issue which still remains to be tried (cf. 369 F. Supp. 917) is whether the claims at bar, which involve events which took place 10 years prior to the filing of this action are barred by the statute of limitations. In view of the stale nature of plaintiff's claim and the public reporting and awareness in the early 1960's of the fall of the Zeckendorf financial empire (which event is the gravamen of the alleged fraud), the statute of limitations issue will have to be determined on an individual basis as to each member of the class. Since there are 1100 purported class members, such will be a colossal judicial task, the necessity for which should bar any thought of class action certification at bar. See, e.g., *Speros* v. *Nelson,* 16 F.R.Serv. 2d 1506, 1508-09 (D. Ore. 1973). See also: *Schaffner* v. *Chemical Bank,* 339 F. Supp. 329, 337 (S.D.N.Y. 1972); *Gneiting* v. *Taggares,* 15 F.R.Serv. 2d 311, CCH 1973 Trade Cases ¶74,440 (D. Idaho 1973).

In *Speros, supra* (16 F.R.Serv. 2d 1506), a fraud action brought under the federal securities laws, the Court denied

class action certification because of the "significant problem" posed by the statute of limitations defense raised by the defendants. The Court stated (at pp. 1508-09):

> "In this case the passage of time prior to the filing of the instant complaint presents a significant problem for class action treatment of the group of 'prospectus buyers.' * * * Given the long pause between the issue of the prospectus in November 1967 and the filing of the complaint in August 1972, the court cannot ignore the strong possibility that the claims of many, if not all of the group of 'prospectus buyers,' are time barred."
>
> *"There will be individual questions of fact as to each member of the 'class' vis-a-vis the issue of the statute of limitations. For each of the shareholders in the group of 'prospectus buyers' there is an individual question as to when the term of the statute began to run.* * * * The problem of the running of the term of the statute of limitations must be resolved as to each shareholder as a separate finding. *Given the pervasiveness of this problem, it cannot be said that the common issues arising from the prospectus will predominate over the individual issues.* The group of 'prospectus buyers' is not an appropriate one for class action treatment under Rule 23 Fed. R. Civ. P." (emphasis added).

The same problem exists as to other issues in the case, especially since plaintiff insists on a trial by jury.* While

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* This Court has already noted the inappropriateness of trying complicated class actions under the antifraud provisions of the federal securities laws to a jury. See *Cohen* v. *Franchard Corp.*, 478 F.2d 115, 117 (2d Cir. 1973) (another action involving the same plaintiff and counsel as the instant case).

some recent decisions have held that individual issues of reliance and damages do not bar class action treatment in *non-jury* cases, class action treatment has been denied in *jury* cases where there are individual issues as to reliance* (see, e.g., *Morris* v. *Burchard,* 51 F.R.D. 530 (S.D.N.Y. 1971) and damages (see, e.g., *Lah* v. *Shell Oil Co.,* 50 F.R.D. 198 (S.D. Ohio 1970)). See also: *Crasto* v. *Est. of Keskel,* CCH Fed. Sec. L. Rep. ¶94,524 at p. 95,810 (S.D.N.Y. 1974).

Indeed, since this is a jury trial, and since the fact issues raised regarding the statute of limitations defense, reliance, damages and exemplary damages are inextricably interwoven with the other factual issues in the case, it seems clear that *all* such issues will have to be submitted to and determined by a single jury in one trial. See, e.g., *Gasoline Products Co.* v. *Champlin Refining Co.,* 283 U.S. 494, 500-01 (1931); *United Air Lines* v. *Wiener,* 286 F.2d 302, 306 (9th Cir. 1961).**

As the Supreme Court stated in *Gasoline Products Co.* v. *Champlin Refining Co., supra* (283 U.S. at 500-01), in reversing a direction that a jury case be retried on the issue of liability only:

> "[A] partial new trial . . . may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. Here the

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* Even if reliance need not be affirmatively proved by plaintiff, as she suggests, defendants still have the right to disprove it, as will be done at bar. See, e.g., *Rochez Bros., Inc.* v. *Rhoades,* 491 F.2d 402, 410 (3d Cir. 1974).

** The fact that this would be a class action does not alter this, since it is settled that Rule 23 does not and cannot be interpreted to deprive any party of any substantive litigative right. See *Synder* v. *Harris,* 394 U.S. 332 (1969).

> question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial [citation omitted]. There should be a new trial of all the issues raised by the counterclaim [citations omitted].

In sum, given the difficult individual issues presented at bar, this case appears to fall squarely within the Court's apt conclusion in *Schaffner* v. *Chemical Bank, supra* (339 F. Supp. at 337):

> "Parenthetically, the notion of utilizing a jury trial in a class suit containing the varied problems certain to abound herein, is enough to chill any further discussion of the required superiority of a class claim over other available methods for the fair and efficient adjudication of the controversy. Such a trial, whether one trial or the multiple mini-trials probably required, would withdraw from all other usefulness for years to come the federal judicial personnel involved. Where one could muster jurors willing to devote themselves so indefinitely in time from their accustomed tasks, is puzzling. And one might relevantly ask—what public interest would be served by devoting the public's facilities in this way and what just purpose requires such a colossal marshalling of judicial resources and their supporting personnel?"

Under these circumstances, the order appealed from should be affirmed even if Judge Ward is somehow found to have abused his discretion with regard to plaintiff's tardiness and inadequacy as a class representative, since there

are predominant non-common questions and the prosecution of this jury action as a class action would be judicially and practically inefficient and wasteful.

CONCLUSION

The belated motion by plaintiffs for class action determination was properly denied. The order appealed from should be affirmed.

Respectfully submitted,

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STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

Joseph Camuto , being duly sworn, deposes

and says, that on the 31st day of December 1974 , at 12 o'clock

P. M. he served the annexed Brief of Defendants-Appellees in RE: Friedlander v. Feinberg, No. 74-1777 (et al)

upon See Second Sheet

Esq(s)., Attorney(s)

for See Second Sheet

by depositing 2 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (his/their) office

See Second Sheet

that being the address designated in the last papers served herein by the said attorney.

Sworn to before me this 31st day of December 1974

Joseph Camuto

Michael H. Sohn

MICHAEL H. SOHN
Notary Public, State of New York
No. 41-9100710
Qualified in Queens County
Commission Expires March 30, 1975

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Sworn to me this 31st
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